(3)

No. 06-1314

FILED
MAY 14 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

# Supreme Court of the United States

JMC TELECOM, LLC,

*Petitioner,*

*v.*

AT & T CORP.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## REPLY BRIEF

RUSSELL F. BRASSO
FOREMAN & BRASSO
930 Montgomery Street
San Francisco, CA 94133
(415) 433-3475

JOSEPH M. ALIOTO
*Counsel of Record*
ALIOTO LAW FIRM
555 California Street
San Francisco, CA 94104
(415) 434-8900

GIL D. MESSINA
MESSINA LAW FIRM, P.C.
961 Holmdel Road
Holmdel, NJ 07733
(732) 332-9300

*Attorneys for Petitioner*

208678

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

## STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *iii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

## TABLE OF CONTENTS

*Page*

Statement Pursuant to Rule 29.6 ..... i

Table of Contents ..... ii

Table of Cited Authorities ..... iv

A. Petitioner Does Not Challenge The Third Circuit's Decision With Respect To The Issue Of "Participating Carrier." Rather, JMC Submits That Whether PGE Was Or Was Not A "Participating Carrier" Is Irrelevant To The Issue Whether AT&T Breached The Tariff When It Did Not Use "AT&T Facilities" As The Tariff Stated. ..... 1

B. JMC Never "Told The Third Circuit That It Was A 'Wholesaler' And 'Distributor' Of AT&T's Service," As AT&T Asserts. Rather, JMC Has Always Maintained That AT&T And JMC Competed Against Each Other At The Same Level. ..... 4

C. Contrary To AT&T's Assertion, The Division Of Markets By AT&T And JMC Resulted In A Reduction Of Inter-Brand, Not Intra-Brand Competition. ..... 6

*Contents*

*Page*

D. The Third Circuit Affirmed The District Court's Dismissal Of JMC's Division Of Markets Claim Wherein The District Court Held There Was Not Concerted Action. The Issue Of Concerted Action Was Necessarily Dependent Upon The Third Circuit's Characterization Of The Market Restraint As Vertical Instead Of Horizontal. ..... 8

Conclusion ..... 9

## TABLE OF CITED AUTHORITIES

*Page*

**Cases:**

*AT&T v. Cent. Off. Tel., Inc.*,
524 U.S. 214 (1998) ..... 2, 3, 4

*Bus. Elecs. Corp. v. Sharp Elecs. Corp.*,
485 U.S. 717 (1988) ..... 8

*Conley v. Gibson*,
355 U.S. 41 (1957) ..... 6

*Monsanto v. Spray-Rite Serv. Corp.*,
465 U.S. 752 (1984) ..... 8

*Palmer v. BRG of Georgia, Inc.*,
498 U.S. 46 (1990) ..... 6, 7

*Perma Life Mufflers, Inc. v. International Parts Corp.*,
392 U.S. 134 (1968) ..... 5, 9

**Acts:**

Sherman Antitrust Act ..... 6, 8

**Rules:**

Fed. R. Civ. P. 12(b)(6) ..... 6

Respondent AT&T Corp. ("AT&T") argues against issues that are not raised by the Petition for Certiorari.

**A. Petitioner Does Not Challenge The Third Circuit's Decision With Respect To The Issue Of "Participating Carrier." Rather, JMC Submits That Whether PGE Was Or Was Not A "Participating Carrier" Is Irrelevant To The Issue Whether AT&T Breached The Tariff When It Did Not Use "AT&T Facilities" As The Tariff Stated.**

AT&T argues in its opposition brief in support of the Third Circuit's ruling that Pacific Gateway Exchange ("PGE"), the sub-tier carrier that AT&T used to transport petitioner JMC Telecom, LLC's ("JMC") customers' calls, was not an "other participating carrier," as that term has been defined by the FCC. Opp. Br. at 5, 9. JMC does not, however, challenge that ruling by its Petition. Whether PGE was an undisclosed "other participating carrier" is irrelevant to JMC's argument that AT&T breached the filed tariff when it used PGE's telecommunications facilities instead of the AT&T facilities it expressly represented in the tariff would be used.

Instead, JMC argues that, in § 2.2.5 of its Filed Tariff #1, AT&T committed to utilize its own telecommunications service – and not PGE's – when it wrote into the tariff: "the Customer [JMC] may inform its subscribers that calls placed using the AT&T Prepaid Card account number will be carried over *AT&T's facilities*." (Emphasis added.) Pet. at 2. In its decision, the Third Circuit appeared to understand this: "JMC asserts that, pursuant to . . . AT&T Tariff No. 1, AT&T would be the exclusive provider of the services needed to complete calls using the cards." App. A at 3a. And, "JMC claims that AT&T breached the tariff by not serving as the exclusive provider of services to the Philippines and but [sic] instead by relying on Pacific [PGE]." App. A at 12a-13a. Nonetheless, the Third Circuit rejected JMC's argument that AT&T had breached the tariff

because, according to the Court, a "claim . . . for quality of service . . . is barred by the filed rate doctrine." App. at 16a.[1]

The Third Circuit's decision was predicated on *AT&T v. Cent. Off. Tel., Inc.*, 524 U.S. 214 (1998), which it understood to "exclude claims of insufficient and poor-quality service." App. A at 11a (*citing Central Office*, 524 U.S. at 233.).

JMC's claim that AT&T breached the tariff is based upon the commitment made by AT&T to JMC in § 2.2.5 of the Filed Tariff to the effect that JMC could inform its customers that calls made with JMC's prepaid phone cards would be carried over AT&T's facilities. Instead, the calls were carried over PGE's facilities, and most of them never went through.[2] JMC respectfully submits that *Central Office* does not prohibit a claim relating to quality of service if the claim is predicated on the breach of an express undertaking in the tariff, and the Supreme Court should correct the Third Circuit's misunderstanding concerning the reach of the holding in *Central Office*.

AT&T argues that it could not be expected – presumably notwithstanding its representation in § 2.2.5 in the Filed Tariff – to use AT&T service exclusively because AT&T had to "route[] the call to another carrier for completion in that foreign country."

---

1. At that point in its decision, the Third Circuit speaks in terms of an oral representation to provide exclusive AT&T service. JMC agrees that an oral representation would be barred by the filed rate doctrine; but the Court's holding is clear that the filed rate doctrine barred JMC's claim, not because, as the Court mistakenly assumed, AT&T's promise was oral, but because "such a claim is one for quality of service and is barred by the filed rate doctrine." *Id.*

2. As stated in its opposition brief in the Third Circuit, AT&T repeats its complaint that JMC's argument with respect to § 2.2.5 of the Filed Tariff was not raised below and is, therefore, waived. Opp. Br. at 9, n. 3. As JMC pointed out in its Reply Brief in the Third Circuit, the argument was made to the District Court, even though the Court failed to address it in its decision. JMC Reply Br. 4, n. 2 (citing Appellant's Supplemental Appendix at 3-4).

Opp. Br. at 3. In its Opposition Brief, AT&T describes PGE as "the local Philippine carrier AT&T had contracted with to complete calls in that country." *Id.* That is incorrect and, although the District Court initially accepted this factual assertion by AT&T, the Third Circuit corrected the error.[3] App. A at 13a. In short, the Third Circuit found that PGE was not a local carrier in the Philippines, contrary to what the District Court found, but had instead picked up JMC's customers' calls in the United States and used PGE facilities as the international telecommunications service to transport the calls overseas, contrary to what AT&T had committed in the Tariff to do. Nevertheless, the Third Circuit felt constrained from providing JMC relief because the Court believed that *Central Office* prohibits claims relating to quality of service.[4]

In its decision, the Third Circuit restated what has become an all-too-common refrain in filed rate doctrine cases:

> Although the filed rate doctrine produces harsh results in this case as alleged, such equitable concerns have been rejected by the Supreme Court. *Maislin Indus. v. Primary Steel, Inc.*, 497 U.S. 116, 128, 110 S. Ct. 2759, 111 L. Ed. 2d 94 (1990) (noting

---

3. The District Court had said, "Here, PGE did not provide international direct dial service to customers, but rather provided local connecting service in the Philippines to AT&T." App. C at 33a. The Third Circuit disagreed and correctly found that PGE was not a local Philippines carrier, but instead provided AT&T with "'international direct dial voice, fax or data communication.' Simply put, the International Services Termination Agreement is not reconcilable with the District Court's rationale," as the Court stated. App. A at 13a.

4. Although AT&T continues to mischaracterize PGE as a Philippines carrier, it nonetheless acknowledged for the first time that its use of PGE was the cause of the damage that resulted ultimately in the destruction of JMC's business: "The call completion difficulties petitioner's end-users experienced resulted from AT&T's use of one such low-cost carrier in the Philippines, Pacific Gateway Exchange ('PGE')." Opp. Br. at 3.

> that "[d]espite the harsh effects of the filed rate doctrine, we have consistently adhered to it."). This is true regardless of AT&T's ulterior motives. *See Cent. Off. Tel.*, 524 U.S. at 223.

App. A at 12a, n. 11.

JMC now asks the Supreme Court, not to entertain prohibited "equitable concerns," but to permit JMC to enforce the tariff to which AT&T bound itself to the same extent that AT&T was permitted to enforce the tariff against JMC. That doing so will have the salutary effect of producing an equitable result is not an unimportant consequence.

JMC respectfully submits that it is important for the Supreme Court to clarify whether a breach of tariff claim which relates to the quality of service that is promised in a tariff is barred by *Central Office*.

**B. JMC Never "Told The Third Circuit That It Was A 'Wholesaler' And 'Distributor' Of AT&T's Service," As AT&T Asserts. Rather, JMC Has Always Maintained That AT&T And JMC Competed Against Each Other At The Same Level.**

AT&T is demonstrably incorrect in stating that JMC was "a novice company" in marketing prepaid calling cards (Opp. Br. at 2) at the time that AT&T approached JMC to sell JMC AT&T's telecommunications services for JMC's cards. Indeed, it was AT&T who was the novice in the international prepaid phone card business and JMC which had established a successful niche in the maritime market by selling phone cards to itinerant seamen through ships' chandlers. A market that was estimated in 1998 as capable of generating sales of at least $180,000,000 per year. JMC Br. at 8-9 (JMC App. 368; 546-47; 556; 713-19; 728-29; 759-60; 872; 1423-24; 1432).

AT&T is demonstrably wrong in its assertion that JMC has admitted it was a "'wholesaler' and 'distributor' of AT&T's

service." Opp. Br. at 10. Paragraphs 2, 3 and 6 of JMC's counterclaim, upon which AT&T relies, do not so state.

- Paragraph 2 states: "JMC's primary business was the design, marketing and selling or prepaid telephone calling cards."
- Paragraph 3 states: "Among other things, AT&T is engaged in the business of providing telecommunications network services to companies that sell prepaid telephone cards."
- Paragraph 6 states: "On or about September 11, 1998, JMC and AT&T entered into a contract pursuant to which AT&T agreed to provide its telecommunications network service for telephone calls made with prepaid calling cards which were to be sold by JMC."

There is nothing in JMC's averments which suggests that JMC was a "wholesaler" or "distributor" of AT&T's service. JMC sold its own prepaid phone cards, which were supposed to have used AT&T's telecommunications facilities to transport the calls overseas. JMC did not wholesale or resell AT&T's telecommunications service and was not an AT&T distributor.

AT&T also misread JMC's brief in the Third Circuit. Page 10 of the brief speaks about *JMC's* distributors, i.e., the ship's chandlers who resold JMC's phone cards. JMC Br. at 9-10. Similarly, page 15 of the brief refers to "international distributor" in the context of a firm which sold phone cards in the international market. The statement was taken from the deposition testimony of AT&T's Chu Chu Kinkley, who grouped JMC with other firms who sold AT&T's own phone card. JMC App. 546-47. Finally, AT&T's reference to page 51 of JMC's brief, wherein JMC referred to "supplier and its distributor," had nothing to do with JMC's relationship to AT&T. It was, rather, a citation to the decision in *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968), to support JMC's argument that even in the context of a supplier-distributor relationship, a supplier cannot claim that it acted unilaterally

when it forced its distributor to violate the Sherman Antitrust Act.

JMC was not an AT&T distributor. Rather, it was a direct competitor who sold its "Rring Latitude" card in direct competition against AT&T's prepaid phone card. Those were the unambiguous allegations in JMC's Counterclaim. JMC App. 255-62. See Pet. at 8-9. Rather than accept JMC's averments as true, as the District Court and Third Circuit were required to under Fed. R. Civ. P. 12 (b) (6) (*Conley v. Gibson*, 355 U.S. 41 (1957)), the lower courts *found* otherwise, concluding that "the relationship was primarily vertical." App. A at 8a.

The facts, as alleged in the counterclaim, support the conclusion that JMC was not a distributor of AT&T, notwithstanding that AT&T provided the telecommunications service for JMC's phone cards. As such, the lower courts should not have dismissed the counterclaim under Rule 12(b)(6) on the grounds the counterclaim failed to allege a horizontal division of customers and markets, a per se violation of the Sherman Act.

### C. Contrary To AT&T's Assertion, The Division Of Markets By AT&T And JMC Resulted In A Reduction Of Inter-Brand, Not Intra-Brand Competition.

AT&T argues that *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) is "vastly different" from this case because in *Palmer*, the market division that was condemned as a per se violation of the antitrust laws lessened inter-brand competition, whereas, according to AT&T, this case involves intra-brand competition. Opp. Br. at 10-11.[5]

AT&T's conclusion is premised on the false assumption that JMC and AT&T sold the same prepaid phone card. It is undisputed that they did not. The two companies' phone cards

5. Although it was an important part of JMC's argument in the Third Circuit, the Court did not mention *Palmer* in its decision.

were not the same. They did not have the same attributes or pricing and did not even have the same appearance. In fact, whereas AT&T's cards used AT&T's reliable telecommunications facilities, JMC's cards were saddled with PGE's substandard facilities. AT&T never sold JMC's Rring Latitude phone card and JMC never sold AT&T's phone card.

AT&T's argument, which is dependent upon the probity of its argument that JMC was AT&T's distributor, is circular. Whether *Palmer* controls depends on the answer to the second question presented by JMC's Petition:

> Does the Supreme Court's rule that declares a naked restraint of trade in the form of a division of markets between competitors to be a *per se* violation of the antitrust laws apply where one of the competitors supplies a component of the other's product [i.e., the telecommunications service that allows the product to function]?

If the answer to the question is "yes," then *Palmer* clearly applies because the restraint was horizontal and necessarily reduced inter-brand competition.

This question, concerning, as it does, the proper application of *per se* rules of antitrust jurisprudence, is an important one for the Supreme Court to address.

**D. The Third Circuit Affirmed The District Court's Dismissal Of JMC's Division Of Markets Claim Wherein The District Court Held There Was Not Concerted Action. The Issue Of Concerted Action Was Necessarily Dependent Upon The Third Circuit's Characterization Of The Market Restraint As Vertical Instead Of Horizontal.**

The District Court dismissed JMC's division of markets claim, holding that "when a dealer unwillingly complies with a supplier's demand, no agreement for purposes of § 1 [of the Sherman Act] exists." App. E at 59a (*citing Monsanto v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984). The District Court also relied upon *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988) in support of its conclusion that the parties' conduct was vertical and should have been analyzed under rule of reason principles. App. E at 59a. The Third Circuit similarly relied upon *Sharp* in finding that the relationship was vertical and should be analyzed under the rule of reason. App. A at 8a.

The question whether the parties' relationship was that of a supplier and distributor and whether the restraint was, therefore, vertical, is the second question raised by the petition. See above. *Sharp* made clear that determining whether a relationship is vertical or horizontal will be a strong factor in determining whether there was concerted or unilateral action in the imposition of the market restraint and, whether the restraint was, consequently, illegal. *Sharp*, 485 U.S. at 743-47.

The issue of unilateral versus concerted action is dependent on the analysis of vertical versus horizontal restraints.

JMC submits that the Third Circuit's affirmance of the District Court's dismissal of JMC's market division claim was necessarily predicated on both of the District Court's conclusions, i.e. that the relationship was vertical and that it did not involve concerted action. If this Court grants certiorari to consider JMC's second question, it follows that certiorari

should also be granted to consider whether the market restraint involved concerted action. In this regard, JMC had relied upon the Supreme Court's decision in *Perma Life Mufflers*, *supra*, in the proceedings below, but both the District Court and Third Circuit failed to address it.

## CONCLUSION

For the reasons stated in the Petition for Certiorari and above, petitioner respectfully submits that its petition should be granted.

Respectfully submitted,

RUSSELL F. BRASSO
FOREMAN & BRASSO
930 Montgomery Street
San Francisco, CA 94133
(415) 433-3475

JOSEPH M. ALIOTO
*Counsel of Record*
ALIOTO LAW FIRM
555 California Street
San Francisco, CA 94104
(415) 434-8900

GIL D. MESSINA
MESSINA LAW FIRM, P.C.
961 Holmdel Road
Holmdel, NJ 07733
(732) 332-9300

*Attorneys for Petitioner*